



SIERRA NORTHERN RAILWAY

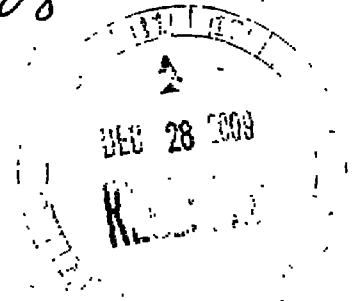
221 First Street
Davis, CA 95616
Tel: 530-759-9658
Fax: 530-759-9872

December 24, 2009

VIA Federal Express

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

226208



Re: FD 35331, Sierra Northern Railway – Lease and Operation Exemption – Union Pacific Railroad Company

Dear Ms. Brown:

Enclosed for filing in the above captioned docket is Sierra Northern Railway's Opposition to Cemex, Inc's Motion to Hold Notice of Exemption in Abeyance

Please contact me if you have any questions regarding this response filing.

Thank you.

Sincerely,

Torgny Nilsson
Attorney
Sierra Northern Railway

ENTERED
Office of Proceedings

DEC 28 2009

Part of
Public Record

cc: Union Pacific Railroad Company
Sandra L. Brown, Attorney for Cemex, Inc.
Santa Cruz County Regional Transportation District

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35331

**SIERRA NORTHERN RAILWAY'S OPPOSITION TO CEMEX, INC.'S MOTION TO
HOLD NOTICE OF EXEMPTION IN ABEYANCE**

EXPEDITED HANDLING REQUESTED

**ENTERED
Office of Proceedings**

DEC 28 2009

**Part of
Public Record**

**Torgny Nilsson
Sierra Northern Railway
221 1st Street
Davis, CA 95616
Tel. 530-759-9658
Fax 530-759-9872**

Attorney for Sierra Northern Railway

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. FD 35331

SIERRA NORTHERN RAILWAY'S OPPOSITION TO CEMEX, INC.'S MOTION TO HOLD NOTICE OF EXEMPTION IN ABEYANCE

EXPEDITED HANDLING REQUESTED

Sierra Northern Railway ("SERA"), hereby objects to CEMEX, Inc.'s Motion to Hold in Abeyance SERA's Notice of Exemption under 49 C.F.R. Part 1150, Subpart E—*Exempt Transactions Under 49 U.S.C. 10902*, which sought to permit SERA to acquire and operate a freight rail line owned by Union Pacific Railroad Company ("UPRR").

INTRODUCTION

SERA on December 1, 2009 filed a Notice of Exemption to acquire from UPRR the freight operating rights to a 31-mile rail line located in Santa Cruz County, California. While currently lacks sufficient traffic to cover its costs, SERA believes it can in the long run cover those costs run through increased freight marketing and other efforts. In the short run, however, SERA was counting on covering costs with an approximately \$100,000 short line tax credit available to SERA as long as SERA takes possession of the line by December 31, 2009. SERA ensured that its acquisition of the line, and its Notice of Exemption, were timed to permit SERA to meet that deadline.

CEMEX, Inc.—which once operated a now-closed cement plant at one end of the line—has filed a motion to hold SERA's Notice of Exemption in abeyance for seven days (until January 7, 2010) claiming that it needs the time to obtain answers to questions

concerning the plans of parties and potential future transactions that have nothing to do with SERA's acquisition and that are not even arguably relevant unless those transactions occur and unless CEMEX reopens its cement plant, which CEMEX refuses even now to say it will do.

The Board should deny CEMEX's motion as premature, pertaining as it does solely to separate—and currently merely potential—transactions between UPRR and the Santa Cruz County Regional Transportation Commission ("RTC") which, if they occur, will be subject to separate Board filings to which CEMEX may object at the appropriate time. The Board should also deny CEMEX's motion as baseless, because if anything in SERA's Notice is ever found to have been false or misleading; CEMEX may at that time move to have the Board rule that SERA's motion is *void ab initio*. There is no showing of anything false or misleading in SERA's notice, and therefore no reason to grant the requested motion. Finally, the Board should deny CEMEX's motion as granting its motion will prevent SERA from receiving the short line tax credit it needs to invest in the line to ensure that the line can be kept open while SERA seeks new freight customers on the line and waits for CEMEX to reopen its plant.

ARGUMENT

CEMEX states in its Motion that "CEMEX is not necessarily opposed to SERA's lease and CEMEX acknowledges that the Board has found that some branch lines benefit from short lines taking over operations from a Class I railroad." (CEMEX Motion, p. 4, ¶ 2.) CEMEX nevertheless asks the Board to grant its motion because it believes that SERA's Notice is incomplete in two ways: (1) in failing to describe the acquisition's effect

on continued freight rail service; and (2) in failing to address publicly available information about non-freight plans for the line. (CEMEX Motion, p. 2, ¶1.) CEMEX's request is misguided.

CEMEX's concerns about the acquisition's effect on continued freight rail service are unfounded because SERA has clearly stated in its Notice that its acquisition will not cause any significant changes to carrier operations on the line. (SERA Notice, p. 3, ¶ (k).) Not that it should matter to CEMEX. CEMEX has acknowledged in its Motion that its plant in the area has been closed since March 2009 (CEMEX Motion, p. 2, ¶ 3) and CEMEX is very careful not to assert that it will ever reopen its plant. In any event, SERA's statement is nothing unusual and means just what it says: that SERA's operation of the line will not differ from UPRR's operation of the line, regardless of the amount of traffic on the line. If CEMEX reopens its plant and starts shipping again, SERA will happily handle any traffic that CEMEX can generate. That is, after all, SERA's business.

CEMEX's concerns about non-freight plans for the line are also unfounded. For one thing, the Big Trees & Pacific Railroad already operates passenger service on the line, and has done so for years, without causing problems for freight traffic. (See <http://www.roaringcamp.com/beach.html>.) For another thing, SERA does not operate any passenger trains; SERA is solely a freight railroad. CEMEX admits in its Motion that SERA has already assured CEMEX—in writing—that additional passenger service is at most a future possibility and that, in any event, freight operations will take priority over passenger service. (CEMEX Motion, p. 4, ¶ 2.) Also, the detailed information CEMEX has provided in its Motion and in its exhibits concerning the RTC's future hopes and plans for the line, and CEMEX's admission that it has maintained an "ongoing dialogue" with the

RTC “for the past several years,” reveals that CEMEX most likely has more information about the RTC’s hopes and plans than virtually any other person or entity. (See CEMEX Motion, p. 3, ¶¶ 2-3 and Exhibits 1-4.) CEMEX is the last entity that needs more information about either the RTC or its plans, especially as the RTC is not a part to the transaction at issue here.

All of the questions raised by CEMEX have either already been answered or relate to events that may, or may not, happen in the future. CEMEX is not currently shipping on the line, has not done so since March 2009, and refuses to state whether it will ever do so again. And the RTC is not by this Notice seeking to acquire the line, install any trail, add any new passenger service, or abandon the line. If and when it seeks to do so, its plans will be subject to a new Board filing and to objection by CEMEX. Today, at least, there is simply no controversy needing to be addressed and the Board should deny CEMEX’s Motion in its entirety.

CONCLUSION

SERA has sufficiently addressed CEMEX’s concern about SERA’s continuation of freight operations on the line if CEMEX ever decides to reopen its now-closed plant. CEMEX’s other concerns have nothing to do with this transaction, as they relate solely to potential future transactions between other parties that will be subject of their own Board filings and objections if they occur. If any misstatement is in future found to have been made by SERA in its Notice, CEMEX can attach SERA’s Notice then, rendering it *void ab initio*. There is simply no reason for CEMEX to seek to do so now based solely upon fears as to events that may or may not come to pass.

For all these reasons, and as discussed above, SERA respectfully asks the Board to deny CEMEX's Motion in its entirety and to allow SERA to take possession of the line on December 31, 2009 as current planned such that SERA does not lose its right to the short line tax credit it needs to invest in the line to ensure its continued operation.

Respectfully Submitted,



Torgny Nilsson
General Counsel
Sierra Northern Railway
221 1st Street
Davis, CA 95616
Tel. 530-759-9658
Fax 530-759-9872

Attorney for Sierra Northern Railway

Dated: December 24, 2009

CERTIFICATE OF SERVICE

I, David Magaw, certify that on December 24, 2009, I caused a copy of the foregoing to be served by e-mail and overnight delivery upon the following:

Sandra Brown
Thompson Hine LLP
Suite 800
1920 N. Street, N.W.
Washington, DC 20036

E-mail: Sandra.Brown@ThompsonHine.com

and via overnight mail upon the following:

Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

Regional Transportation Commission
Santa Cruz County
1523 Pacific Avenue
Santa Cruz, CA 95060

A handwritten signature in black ink, reading "David Magaw", is written over a horizontal line.

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. FD 35331

**SIERRA NORTHERN RAILWAY'S OPPOSITION TO CEMEX, INC.'S MOTION TO
HOLD NOTICE OF EXEMPTION IN ABEYANCE**

VERIFIED STATEMENT OF DAVID MAGAW

1. My name is David Magaw and I am the President of Sierra Northern Railway ("SERA"). As such I am responsible for all of its operations and maintenance activities.

2. Thomas Egan of Egan Consulting noticed SERA on December 18, 2009 that CEMEX may have some concerns regarding UPRR's lease of the Santa Cruz Branch to SERA. At my instruction, Alan Lambert, SERA's Vice President of Marketing, called Gary Burns of CEMEX to ask about those concerns. Based upon that discussion, Mr. Lambert prepared, with my review and approval, a December 18, 2009 e-mail to Mr. Burns which specifically addressed each of Mr. Burn's expressed concerns. That e-mail is referenced, but not attached to, CEMEX's Motion. A true and correct copy of Mr. Lambert's e-mail is attached hereto as Exhibit A.

3. The purpose of the Lease Agreement ("Lease") between UPRR and SERA is specifically to maintain the freight operations on the Santa Cruz Branch. As stated in Mr. Lambert's e-mail, "[f]reight is and always will be the prime focus and intent of SERA with regards to operations of the Santa Cruz Branch" and that "freight will always take priority.:

I do not know how SERA could possibly provide CEMEX with more assurance that SERA will continue to support and protect freight operations.

4. CEMEX also complains that SERA has not addressed freight rates with CEMEX. Since CEMEX shut down its plant in March 2009, and has to my knowledge never given SERA, UPRR, or the RTC any information as to when, if ever, CEMEX will reopen its plant and resume shipping freight over the line UPRR and SERA have not set any handling carrier rates (or other transportation rates) for SERA's and UP's prospective handling of CEMEX's traffic. UPRR and SERA have left the setting of those rates until such a time as we can more appropriately address the costs and market conditions for those rates. As Mr. Lambert states in his e-mail, "[SERA] will do our best to ensure [CEMEX's] rates are competitive and service excellent." It is in SERA's best interests to assure that CEMEX ships the maximum amount of traffic by rail. Freight, and not passenger operations or trails, is SERA's business.

5. While SERA is aware of negotiations between the RTC and UPRR regarding a proposed sale of the Santa Cruz Branch to the RTC (as is CEMEX according to its own Motion), SERA is not a party to those negotiations and only has such knowledge of those negotiations as is public information (such as that shown on the RTC's website). Notwithstanding any such negotiations, the Lease between UPRR and SERA is anticipated to become effective on December 31, 2009 when permitted under the STB regulations and decision.

6. SERA does not have any knowledge concerning whether any sale between UPRR and the RTC will actually occur. It is, however, SERA's understanding that such a sale may occur, if at all, sometime between early and mid 2010. The information

concerning that potential sale are a matter of public record and constantly being discussed in the press such that CEMEX should not have any significant questions concerning these plans. See, for example, Kurtis Alexander's December 24, 2009 article in the Santa Cruz Sentinel, *New railroad company to take over Union Pacific's county line*, a true and correct copy of which is attached as Exhibit B hereto.

7. The Lease between SERA and UPRR is terminable upon any purchase of the Santa Cruz Branch by the RTC (if that ever happens) subject, however, to any required approvals by the Board. It is SERA's understanding that, in the event of any such sale, UPRR will retain a freight easement over the entire line, with that freight easement being transferred to SERA upon sale. That freight easement would then be subject to an agreement between the RTC and SERA for the coordination and operation of the Santa Cruz Branch. The RTC and SERA have to date not entered into any such agreement. It is premature at this time to predict the outcome of any negotiations between UP and the RTC or between SERA and the RTC.

8. SERA stated in its Notice that there will be "no significant changes in carrier operations." This means that SERA intends to continue the operations that UPRR has performed during the last several years for CEMEX and for other shippers. In fact, SERA has plans to increase the freight traffic and customers and, consequently, the operations on the line. Furthermore, as Mr. Lambert noted in his e-mail, SERA remains willing to work cooperatively with CEMEX by, among other things, operating so as not to block the movement of CEMEX cars, being willing to enter into a demurrage agreement to facilitate service to CEMEX's plant, and doing our best to ensure competitive freight rates for CEMEX.

9. Although SERA is owned by a holding company that also owns tourist railroads, SERA does not operate any passenger trains or tourist railroads. SERA is a freight railroad and railroad construction company. The Lease between SERA and UPRR specifically states that it is for freight operations only and that passenger operations, either tourist or transit, are prohibited.

10. While it is possible that one of SERA's affiliates may one day be able to operate tourist trains on the line, that prospect is very uncertain and remote at this time, as noted by Mr. Lambert in his e-mail to Mr. Burns. In any event, such operations would not change the priority for freight operations. The Big Trees & Pacific Railroad already operates passenger service on the line, and has done so for years, without causing problems of which I am aware for freight traffic, whether on the part of CEMEX or other customers. In fact, tourist operations such as those of the Big Trees & Pacific Railroad often support the maintenance and economic viability of short line railroads. We believe it is more than possible to conduct multiple uses on a rail line without creating any conflict for freight operations, and this is in fact done frequently by short line railroads as well as by Class I carriers.

VERIFICATION

I, David Magaw, verify under penalty of perjury that the foregoing is true and correct based upon my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.


David Magaw
President, Sierra Northern Railway

Dated: December 24, 2009

EXHIBIT A**Dave M**

From: Alan Lambert [alan_h_lambert@msn.com]
Sent: Friday, December 18, 2009 3:14 PM
To: gary.burns@cemex.com
Cc: dmagaw@att.net; gmceburns@yahoo.com
Subject: RE: SIERRA NORTHERN - Santa Cruz Branch
Gary –

Thanks for taking my call today to discuss the proposed takeover of the UP Santa Cruz Branch Line by Sierra Northern (SERA). I appreciate your time and wanted to put into writing some of the issues we discussed.

Sierra Dinner Train Operations

SERA plans to operate the Santa Cruz Branch as a freight railroad primarily. Freight is and always will be the prime focus and intent of SERA with regards to operation on the Santa Cruz Branch. IF SERA decides to operate a Dinner Train (which will be at least 1-3 years from now) freight will always take priority.

Car Storage In Davenport

Per our discussion you indicated that you have 79 cars at Davenport that are on lease and may move to Victorville in the first quarter. Sierra Northern can put together a rate to the Watsonville interchange for you and move the cars per your instructions. SERA plans on storing some cars on the Branch and I will discuss this with you in January 2010 so as not to block your cars.

Handling Carrier Rates with UP

Since the Cemex facility in Davenport is idle, UP did not discuss handling carrier rates with us for any of your business. The UP requested we delay this until the Davenport facility begins shipping. We will do our best to ensure your rates are competitive and service excellent.

Demurrage

SERA is willing to enter into a demurrage agreement with Cemex in order to facilitate service to your Davenport location.

Watsonville Track Storage

Our agreement with UP allows SERA and UP operations to function in tandem in Watsonville. The actual language reads

"SERA and UP shall interchange Equipment (as such term is defined in Exhibit "A") at Watsonville, California, on tracks owned by UP, as designated from time to time by UP's local operating officer (the "Interchange Trackage "). Except as otherwise provided in this Agreement, the use of the Interchange Trackage shall be without charge"

UP is allowing us use of tracks in Watsonville.

Gary – I sincerely appreciate the opportunity to provide service to Cemex and look forward to better economic times and lots of railcars moving down the tracks. I look forward to working with you on this project and West Sacramento. Please let me know if you have any questions or concerns. Best wishes for a Happy Holiday.

Regards,

12/24/2009

Alan H. Lambert
Sierra Northern Railway
530-908-8854

12/24/2009

EXHIBIT B**Santa Cruz Sentinel.com****New railroad company to take over Union Pacific's county line**

By Kurtis Alexander

Posted: 12/24/2009 01:30:18 AM PST

SANTA CRUZ ~ The Union Pacific Railroad, which has long wanted to end its affairs in Santa Cruz County, plans to hand over freight and maintenance responsibilities on its 32-mile county line to a smaller California-based rail company.

On Dec. 31, Sierra Northern Railway will assume a lease for the county rail line, a representative of the Woodland-based company said this week. The private business shortly thereafter will begin using its locomotives, instead of Union Pacific's, to haul what limited freight moves on the local line.

The transfer of operations comes as Omaha-based Union Pacific is in negotiations to sell the coastal rail line between Davenport and Watsonville to the county's transportation agency. Union Pacific officials declined to comment Wednesday on the Sierra Northern lease and how it would affect the sale of the railroad to the county.

But county transportation leaders, who are looking to build a recreational trail along the tracks as well as continue freight service there, praised the selection of a new rail operator as a

step toward removing Union Pacific from the picture.

"This works well for everybody," said county Supervisor John Leopold, who sits on the county Regional Transportation Commission and has been involved in the county's closed-door negotiations to buy the rail line.

Transportation Commission staff said Wednesday the agency hopes to buy the line by March, pushed back from earlier expectations that the rail would be in public ownership by the new year.


Luis Mendez, deputy director of the Transportation Commission, said Sierra Northern would likely continue to haul freight under county ownership of the line. County transportation leaders do not wish to manage freight operations, though a deal with the new short-line operator has yet to be reached, Mendez said.

Sierra Northern currently manages freight operations on 133 miles of railroad, almost all of it in California. Its parent company, Sierra Railroad, also runs tourist trains like the Skunk Train in Mendocino County.

"We've been looking at that line in Santa Cruz for a number of years," said company President Dave Magaw. "There's a lot of sense in doing this freight deal. We're local. We have operations in California. ... Adding a Santa Cruz operation is pretty easy for us to do."

Advertisement

TARGET WEB COUPON		EXPIRES 2/27/10	
25¢ each			
with purchase of twenty-five 4x6" Kodak instant prints			
<small>This coupon is intended for use by the original purchaser only and is void if copied, scanned, transferred, purchased, sold or promoted by any third party. Limit one offer per transaction. Gift cards and tax will not be included in determining purchase total. No cash value. Offer available at Target One Hour Photo Labs. Go to Target.com/photo for the location nearest you. One hour service limited to machine capacity.</small>		 9858-0113-1882-4674-0306-4005-84	

Print Powered By  **Formula Dynamics**

Santa Cruz Sentinel.com

Unlike Union Pacific, whose business is hauling freight long distances, Sierra Northern specializes in short trips. Though the amount of freight moved on the county line has dwindled in recent years — now a handful of produce companies in Watsonville and lumber companies in Santa Cruz — Magaw said he thinks hauling here is still a worthwhile venture.

"We think there's prospects for other business," he said. "It's possible that the Cemex plant in Davenport will come back on line, too."



Sierra Northern, under terms of its contract with Union Pacific, will be responsible for moving all freight in Santa Cruz County and passing it off to Union Pacific trains in Watsonville.

The operator's parent company would also be interested in running tourist trains on the line, Magaw said. Though, he noted, that would be subject to future discussions with the county and Roaring Camp Railroads, a local tourist train operator.

Magaw also said Wednesday his company was supportive of the county's efforts to build a pedestrian and bicycle trail along the tracks, a proposition that has scared off other railroad companies because of the safety issues.

"That's something that's very workable along with running the railroad, which is our priority business," he said.

Advertisement

TARGET WEB COUPON		EXPIRES 2/27/10	
25¢ each with purchase of twenty-five 4x6" Kodak instant prints			
<small>*This coupon is intended for use by the original recipient only and is void if copied, scanned, transferred, purchased, sold or prohibited by law. Limit one offer per transaction. GiftCards and tax will not be included in determining purchase total. No cash value. Offer available at Target One Hour Photo Labs. Go to Target.com/photo for the location nearest you. One Hour service limited to machine capacity.</small>			
		0858-0113-1882-4674-0306-4005-84	

Print Powered By  dynamatDynamics